

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUN 14 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0002-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JOSE H. SOTELO,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR20052469, CR20054069

Honorable Hector E. Campoy, Judge

REVIEW GRANTED; RELIEF DENIED

Patrick C. Coppen

Tucson
Attorney for Petitioner

K E L L Y, Judge.

¶1 Pursuant to a plea agreement, petitioner Jose Sotelo was convicted of solicitation to possess cocaine and unlawful possession of drug paraphernalia in CR20052469, and possession of a deadly weapon by a prohibited possessor in CR20054069. The trial court suspended the imposition of sentence and placed Sotelo on three years' probation. After he admitted violating certain conditions of probation

alleged in a petition to revoke probation, the court revoked Sotelo's probation and sentenced him to time served for the offenses in CR20052469 and to the presumptive prison term of 2.5 years for the weapons misconduct charge in CR20054069, crediting him on August 26, 2008, with 101 days' presentence incarceration credit. Sotelo sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. The trial court summarily denied relief, and this petition for review followed. Absent a clear abuse of discretion, we will not disturb the trial court's ruling. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We see no such abuse here.

¶2 Sotelo contends on review that the trial court erred when it denied relief on his claim that trial counsel had been ineffective during the disposition hearing. He argues that counsel failed to offer any mitigating circumstances, which could have resulted in a sentence that was less than the presumptive term, and that, at the very least, he has raised a colorable claim warranting an evidentiary hearing.

¶3 In order to establish a colorable claim of ineffective assistance of counsel, a defendant must show counsel's performance was deficient, based on prevailing professional norms, and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). To demonstrate the requisite prejudice, the defendant must show there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A colorable claim entitling the defendant to an evidentiary hearing is one which, if taken as true, "might have changed the outcome." *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). Like the ultimate decision whether to grant or deny post-conviction relief, whether a claim is

colorable, warranting an evidentiary hearing “is, to some extent, a discretionary decision for the trial court.” *State v. D’Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988). Again, the court did not abuse its discretion by summarily denying relief.

¶4 In its order denying relief, the court made clear that it had been aware of certain potentially mitigating circumstances at the time it imposed the presumptive prison term because it had reviewed both its notes and the presentence report from the original sentencing hearing and addenda prepared for two disposition hearings. With respect to Sotelo’s claim of prejudice due to the alleged ineffective assistance of counsel, the court concluded “[t]he materials that could have been submitted but were not and the arguments that could have been made for a mitigated sentence, would not have in any way changed the outcome of the imposition of a presumptive sentence.”

¶5 Sotelo has not established the trial court abused its discretion in denying relief on this claim. The court found Sotelo had not been prejudiced by counsel’s performance because, in exercising its broad sentencing discretion, it determined it would not have imposed a different term of imprisonment had counsel presented the additional information, in part because the court had the same information from other sources and, in part, because the defendant had presented as a non-compliant probationer who had not reformed his behavior despite having been given two opportunities to do so. We have no basis for interfering with this determination. *See State v. Thomas*, 142 Ariz. 201, 204, 688 P.2d 1093, 1096 (App. 1984) (appellate court will not disturb sentence that is within statutory limits absent clear abuse of discretion). The trial court’s conclusion was neither arbitrary nor capricious. *See State v. Patton*, 120 Ariz. 386, 388, 586 P.2d 635, 637

(1978) (sentencing court abuses discretion by acting arbitrarily or capriciously or failing to adequately investigate facts relevant to sentencing). Consequently, Sotelo did not sustain his burden of establishing a colorable claim as to one of two essential elements of a successful claim of ineffective assistance of counsel. *See State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985) (if defendant fails to make sufficient showing on either prong of *Strickland* test, court need not determine whether other prong satisfied).

¶6 We grant the petition for review but for the reasons stated herein, we deny relief.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge